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IN THE
Supreme Court of the United States

October Term, 1994

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,
PETITIONERS,

v.

OKLAHOMA TAX COMMISSION, ET AL.,
RESPONDENTS.

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION, INC. IN SUPPORT OF PETITIONER PRIVATE TRUCK COUNCIL OF AMERICA, INC.

GEORGE S. ISAACSON*
MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
Lewiston, Maine 04243-3070
(207) 786-3566

ROBERT J. LEVERING
Senior Vice President
Direct Marketing Association
Washington, D.C. 20543

Attorneys for *Amicus Curiae*
Direct Marketing Association, Inc.

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

RULE 37.3 DISCLOSURE 1

STATEMENT OF INTEREST 2

DECISION BELOW 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. The Tax Injunction Act Does Not Preempt § 1983 Claims In Cases Involving State Taxation 6

II. The Right To Recover Reasonable Attorneys' Fees Would Enable DMA's Members To Assert Their Constitutional Rights 8

A. Without § 1988 Fee Awards, Small Retailers Would Be Unable To Enjoy Fully Their Constitutional Rights Under the Commerce Clause 9

B. Requiring State Courts To Hear § 1983 Actions Would Also Deter Individual States From Wrongfully Interfering With The National Marketplace Created By The Commerce Clause 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Barringer v. Griffes, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 879 (1994) 7

California v. Grace Brethren Church, 457 U.S. 393 (1982) 6n

Carey v. Piphus, 435 U.S. 247 (1978) 9n

TABLE OF AUTHORITIES (*cont'd*)

Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 8

Claflin v. Houseman, 93 U.S. 130 (1876) 7

Dennis v. Higgins, 498 U.S. 439 (1991) 5, 7, 8, 11

Direct Marketing Association, Inc. v. Bennett, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) 4n, 7

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 11n

Howlett v. Rose, 496 U.S. 356 (1990) 5

L.L. Bean, Inc. v. Pledger, No. 91-2479, slip op. (Ch. December 8, 1994) 12n

Maine v. Thiboutot, 448 U.S. 1 (1980) 8, 11

National Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967) 2, 3

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 8

Pechiney Corp. v. Crystal, 43 Conn. Supp. 91, 643 A.2d 319 (1994) 7n, 11, 11n

Private Truck Council of America, Inc. v. Oklahoma Tax Commission, 879 P.2d 137 (Ok. 1994) 4, 13

Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) 2, 3, 9, 10n, 11n

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 4n, 5, 6, 10

Testa v. Katt, 330 U.S. 386 (1947) 5

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 6n

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) 7

STATUTES

UNITED STATES CODE

28 U.S.C. § 1341	4, 7n
42 U.S.C. § 1983	*passim*
42 U.S.C. § 1988	*passim*

MISCELLANEOUS

S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908 — 8n, 9

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RULE 37.3 DISCLOSURE

The Direct Marketing Association, Inc. ("DMA") files this brief as *amicus curiae* in support of the position of Petitioner Private Truck Council of America, Inc. (the "Truck Council"). DMA agrees with the Truck Council that the Oklahoma Supreme Court erred by holding that Oklahoma courts cannot hear 42 U.S.C. § 1983 ("§ 1983") claims involving state taxation. This brief is accompanied by the written consent of the parties.

STATEMENT OF INTEREST

DMA, a not-for-profit corporation, is the oldest and largest trade association representing individuals and companies that are engaged in mail order marketing and advertising. DMA has over 3200 members located in all 50 states and 40 foreign countries. Significantly, the majority of DMA's members are small businesses. Approximately 85% have annual sales of $10 million or less. Approximately 20% employ fewer than 4 people, including "mom and pop" operations that continue to prepare their catalogs on kitchen tabletops and in home offices.

Since its inception in the late 19th century, mail order marketing has attracted start-up companies and local retailers who have recognized opportunities for expansion into a national marketplace. Catalog retailers have been able to sell to this large market despite having limited resources, few employees and locations remote from urban centers. If these entrepreneurs and small businesses are to have continued access to a national marketplace unimpeded by state and local trade barriers, they must have a realistic opportunity to defend themselves against unconstitutional tax assessments without exhausting their financial resources in the process.

The need to clarify the right of business litigants to recover legal fees under 42 U.S.C. § 1988 ("§ 1988") has grown increasingly acute over the past 10 years. During that time, state revenue departments have waged aggressive campaigns to compel mail order companies to collect and remit state and local use taxes. In their zeal, many state tax administrators have violated the Commerce Clause rights of nonresident retailers by disregarding the "substantial nexus" rule articulated by the United States Supreme Court. *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992); *National Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967).

Instead of respecting the clear standards established in *Quill* and *National Bellas Hess*, some state tax administrators have pursued the cynical enforcement strategy of targeting small out-of-state mail order companies for use tax audits and assessments. They have assumed that small retailers located in distant states lack the resources to battle their way through arcane and protracted administrative proceedings and court hearings to protect their constitutional rights. If DMA's members are denied the opportunity to recover reasonable attorneys' fees under § 1988, these intentional — but unsupportable — tax collection efforts will increase. The protections of the Commerce Clause will effectively be placed beyond the reach of those they were intended to safeguard. Since the expense of prosecuting in a foreign state a constitutional challenge to a state tax assessment would present a forbidding, if not insurmountable, barrier to most of DMA's members. It is this very circumstance which § 1988 was designed to prevent.

The gravity of the situation is underscored by the fact that there are at least 14 states with sales and use tax statutes which contain provisions requiring use tax collection under circumstances which are in clear conflict with the Commerce Clause limitations set forth in *Quill* and *National Bellas Hess*. *See*, *e.g.*, GA § 48-8-2(3)(H); IN § 6-2.5-8-10; IA § 422.33(12); KS § 79-3702(h)(2); KY § 139.340(2)(c); MN § 297A.21(4). State tax administrators, auditors and hearing officers often take the position, even after *Quill*, that they are obliged to enforce these statutes until they are repealed by their state's legislature or invalidated by a court of law. As a result, DMA's members face the specter of costly and time-consuming state-by-state battles to defend tax assessments based on unconstitutional tax codes.

DECISION BELOW

This case involves the refusal of a state court to hear and resolve a well-pleaded claim under § 1983, despite its having both the parties and the underlying constitutional controversy properly before it. This Court has already reversed a prior decision of the Oklahoma Supreme Court in this same case which held that a § 1983 claim was not available for Commerce Clause violations.

In erecting yet another barrier to relief under § 1983, the court below reasoned that: (1) in most instances, the Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from hearing cases involving state taxes[1]; (2) as a result, federal courts are usually precluded from adjudicating § 1983 claims involving state taxes, including requests for attorneys' fees under § 1988[2]; and (3) therefore, since federal courts usually will not entertain § 1983 actions in state tax cases, state courts — for reasons of "comity" and "federalism," according to the Oklahoma Supreme Court — must refuse to hear them as well. *Private Truck Council of America, Inc.* v. *Oklahoma Tax Commission*, 879 P.2d 137, 139-141 (Ok. 1994).

[1] Under the Tax Injunction Act, federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." This statute was enacted to prevent federal courts from interfering with the orderly disposition of tax cases by state administrative agencies and courts *provided that* state procedures were sufficiently plain, speedy and efficient. *See, e.g., Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981).

[2] It is clear that § 1983 claims involving state taxation can proceed in federal court in those cases where the bar of the Tax Injunction Act can be avoided. *See, e.g., Direct Marketing Association, Inc.* v. *Bennett*, 916 F.2d. 1451 (9th Cir. 1990), *cert. denied* 500 U.S. 905 (1991) (where uncertainty existed as to whether plaintiff could assert its constitutional claims in state court, a federal district court should hear and resolve the case, including claims arising under § 1983).

SUMMARY OF ARGUMENT

By confusing the jurisdiction-shifting provisions of the Tax Injunction Act with an absolute bar on the prosecution of 42 U.S.C. § 1983 claims in state tax cases, the Oklahoma Supreme Court held that state courts are free to ignore properly pleaded § 1983 claims. This Court has long condemned such discrimination against federal claims as violative of the Supremacy Clause. *See Howlett* v. *Rose*, 496 U.S. 356, 367 (1990); *Testa* v. *Katt*, 330 U.S. 386 (1947). Moreover, the fundamental reasoning of the Oklahoma Supreme Court — that it wished to create uniformity between the remedies available in state and federal courts — is belied by the fact that in those instances where federal courts hear state tax cases (*i.e.*, where the Tax Injunction Act does not apply), they readily award relief under §§ 1983 and 1988.

Neither the Tax Injunction Act nor any other federal law calls for the absolute preemption of § 1983 claims in state tax cases. *See Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981) (the "Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts"). As a result, only state court *acceptance* of jurisdiction over § 1983 claims — not the denial of it — furthers the broad mandate of § 1983, *see Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) ("broad construction is compelled by the statutory language"), as well as the Tax Injunction Act's goal of limiting federal court interference in state tax matters.

Finally, in adopting §§ 1983 and 1988, Congress recognized that parties whose constitutional rights are violated are entitled to recover reasonable attorneys' fees. The constitutional rights of many of DMA's members, however, would be illusory if the Oklahoma Supreme Court's decision were affirmed. More-

over, without the potential for such fee awards, there is no deterrent to the actions of overzealous state revenue departments that are willing to foist unconstitutional tax burdens on nonresident companies.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT PREEMPT § 1983 CLAIMS IN CASES INVOLVING STATE TAXATION.

The Oklahoma Supreme Court misapprehended both the purpose and operation of the Tax Injunction Act (the "Act"). The Act's limited purpose is to shift litigation of state tax controversies from the federal courts to state courts. In operation it protects the states from harm they might suffer due to federal court interference in orderly state procedures governing challenges to state taxation. *See, e.g., Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 526 (1981).

As the Court made clear in *Rosewell*, the Act rests upon a presumption that plaintiffs would be able to assert all federal rights in state court as long as *procedural* criteria are met. 450 U.S. at 519 n.15 (federal courts are divested of jurisdiction under the Act where "a state-court remedy meets certain minimal procedural criteria").[3] No suggestion appears either in the language or legislative history of the Act that it was intended as a limit on the availability of federal causes of action in state

[3] "What little can be gleaned from the legislative history of the Act on the phrase 'plain, speedy and efficient remedy' lends further support to a procedural interpretation." 450 U.S. at 513. *See also California* v. *Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982) (the primary purpose of the Act was to prevent taxpayers from "avoid[ing] state administrative and judicial proceedings"); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (the "basic inquiry" is whether the state provides "a 'plain, speedy and efficient' way for [the taxpayer] to press its constitutional claims").

tax cases — particularly with respect to § 1983, which was intended by Congress to have wide-sweeping application. *See Dennis* v. *Higgins*, *supra*.

Indeed, in those rare cases where the Act does not bar federal jurisdiction over a state tax claim, federal courts have freely adjudicated § 1983 claims and awarded attorneys' fees to prevailing taxpayers. *See*, *e.g.*, *Barringer* v. *Griffes*, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 879 (1994); *Direct Marketing Association, Inc.* v. *Bennett*, 916 F.2d 1451 (1990), *cert. denied*, 500 U.S. 503 (1991). As a consequence, it is the Oklahoma court's refusal to hear a federal cause of action that undermines federalism, *see Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876) (federal "legal and equitable rights . . . may be enforced in any court"), since, by so doing, it declined to respect the superior source and authority of federal law.[4]

The flaw in the lower court's effort to use the Act as a means of ridding itself of jurisdiction over § 1983 claims is further underscored by the well-settled rule that the concurrent jurisdiction of the state courts to hear federal claims can only be defeated by an Act of Congress which "affirmatively divests" the state courts of jurisdiction. *See*, *e.g.*, *Yellow Freight System, Inc.* v. *Donnelly*, 494 U.S. 820, 823 (1990). The Act in no way qualifies as such an affirmative congressional limitation on state court jurisdiction over § 1983 claims.

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[4] Likewise, principles of comity do not support the lower court's decision. *See Pechiney Corp.* v. *Crystal*, 43 Conn. Supp. 91, 643 A.2d 319 (1994) ("These concerns of comity, however, in no way foreclose state courts from hearing § 1983 actions in conjunction with state tax appeals. Neither the letter nor the spirit of § 1341 are violated by the existence of such state court jurisdiction. This jurisdiction, in fact, fully implements the policies of both § 1983 (*i.e.*, the vindication of civil rights) and § 1341 (*i.e.*, the noninterference of federal courts in state tax matters) in a way that federal jurisdiction does not.")

II. The Right To Recover Reasonable Attorneys' Fees Would Enable DMA'S Members To Assert Their Constitutional Rights.

Courts have accorded deep respect to the right to seek attorneys' fees under § 1988 for violations of constitutional rights. As this Court has observed, the reasons for such respect are twofold:

> First, . . . the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

Christianburg Garment Co. v. *EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)) (citation omitted).

Awarding fees to prevailing parties in § 1983 cases serves two important purposes, both of which would be furthered by reversing the court below. First, it allows all persons, regardless of their financial wherewithal, to seek vindication of their constitutional rights. *Dennis* v. *Higgins*, 498 U.S. 439 (1991) (an "award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced").[5] Second, it deters future constitutional violations. *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1, 11 (1980) (fee awards are "an integral part of the remedies necessary to obtain

[5] *See also* S. Rep. No. 94-1011 at 2 (1976), 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court").

compliance with § 1983")(quoting S. Rep. 94-1011 at 5 (1976), U.S. Code Cong. & Admin. News 1976 at 5913).[6]

A. Without § 1988 Fee Awards, Small Retailers Would Be Unable To Enjoy Fully Their Constitutional Rights Under the Commerce Clause.

In *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992), this Court held that the Commerce Clause protects out-of-state retailers with no physical presence in the taxing state from being forced to collect and remit use taxes for those states. Nevertheless, despite this clear and recent precedent, DMA's members continue to be the targets of aggressive campaigns by state tax officials to compel them to collect and remit use taxes in states where they lack such nexus. These demands are often based upon far-fetched theories of nexus which have no basis in established case law and are directly at odds with *Quill*.

State revenue departments have taken special aim at smaller companies on the apparent belief that such companies will be unable to defend themselves in administrative proceedings and court battles far from their home states. This tax collection strategy often bears results for a number of reasons.

First, in most states, a direct marketer subjected to an assessment must wend its way through several levels of administrative hearings before being able to proceed to a hearing in state court. Second, state administrative boards and hearing officers usually refuse even to consider constitutional objections, claiming that state courts alone, and not administrative agencies, are entitled to rule on the constitutionality of either state statutes or the actions of state officials. As a consequence, it can be

[6] *See also Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978) ("the potential liability of § 1983 defendants for attorney's fees . . . provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore due process rights").

years before a substantial constitutional defense to a tax assessment is given any consideration. Third, many state tax codes require that contested tax assessments must be paid prior to any judicial review. *See, e.g., Rosewell, supra*, 450 U.S. at 523. It is not financially feasible for a small direct marketer both to pay the disputed assessment — which can reflect several years of uncollected taxes which are allegedly due and owing, plus interest and penalties[7] — and wage a protracted battle far from its home state for review of the assessment through complex administrative and judicial machinery.

Moreover, it is not uncommon for other state revenue departments to pursue the same theory of tax liability once a fellow state has issued an assessment. Consequently, a small retailer may have to battle several states at the same time over the same constitutional issue. Absent the ability to recover attorneys' fees, the expense of waging multiple constitutional challenges to state tax assessments presents an almost insurmountable barrier for most direct marketers. The reality of the situation often forces these companies to negotiate a compromise settlement of back tax liability and to commit themselves to a costly future of use tax collection. Constitutional rights thereby become a luxury that they cannot afford.

The dilemma faced by DMA's members underscores the substantial federal interest in equipping interstate businesses with an effective means of defending themselves against the purely local aims of aggressive state revenue departments. This Court's Commerce Clause standards would be rendered virtually meaningless if state tax administrators were unconstrained from pressuring small companies into paying disputed tax assessments (or into agreeing to assume the heavy burden of

[7] In cases of an alleged failure to collect and remit use taxes, the amount of an assessment can be staggering since, in most states, no statute of limitations applies. Use tax assessments, therefore, frequently cover periods of six years or more. *See Quill*, 112 S.Ct. at 1916 n.10.

collecting state use taxes voluntarily) under the threat of costly and extended litigation.[8]

The need for reasonable fee awards in the face of unconstitutional tax collection efforts is most acute for small to medium-sized companies. The survival of such companies depends on free, open and non-discriminatory access to a single, unified national marketplace, unfettered by threats of over-reaching regulation and taxation. This Court has made clear that § 1983 is fully available to address Commerce Clause violations. *Dennis* v. *Higgins*, 498 S.Ct. 439 (1992). This right would be defeated if the Tax Injunction Act were interpreted not only to remove federal jurisdiction over challenges to state tax laws, but to eviscerate all § 1983 relief in state tax cases.

B. *Requiring State Courts To Hear § 1983 Actions Would Also Deter Individual States From Wrongfully Interfering With The National Marketplace Created By The Commerce Clause.*

It is well-settled that the fee award authorized by § 1988 is "an integral part of the remedies necessary to obtain compliance with § 1983." *Maine* v. *Thiboutot*, *supra*, 448 U.S. at 11. *See also Pechiney Corp.* v. *Crystal*, *supra*, 643 A.2d at 322 (fee award provides "an additional incentive for the state to comply with the commands of the Constitution"). By affirming the right of direct marketers to assert claims under §§ 1983 and

[8] For this very reason, a number of state courts have upheld jurisdiction over § 1983 claims in state tax cases. In its well-reasoned decision in *Pechiney Corp.* v. *Crystal*, 42 Conn. Supp. 91, 643 A.2d 319, 322 (1994), the Superior Court of Connecticut (Tax Session) explained that, in the absence of § 1988 fee awards, "the state could more easily extract small sums unconstitutionally from its taxpayers. A taxpayer subjected to an unconstitutional tax of a few dollars would be better off paying it than incurring the necessary legal fees to challenge it." As the court explained, "Section 1988 provides a litigation incentive for taxpayers faced with unconstitutional tax assessments regardless of the resources of those parties. *See Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1977)." *Id.*

1988, this Court would acknowledge the important role of these statutes in deterring unconstitutional state actions. Without the potential for attorneys' fees awards, state tax departments would be exposed to absolutely no "downside risk" from issuing unconstitutional tax assessments. Moreover, unless attorneys' fee awards are allowed, the most that can be accomlished from a challenge to an unconstitutional use tax assessment is a refund of taxes, penalties and interest which have already been paid, and perhaps a narrow declaration of rights to prevent future assessments based upon identical facts. The state will have suffered no loss. The need for deterrence is especially important for non-residents, since they make politically appealing targets for state legislatures and aggressive tax administrators.[9]

CONCLUSION

The Tax Injunction Act was never intended to limit the remedies available to constitutional litigants. To the contrary, the sole purpose of the Act was to afford state courts the exclusive opportunity to entertain constitutional objections to state taxation schemes and to provide litigants with all available

[9] For example, in *L.L. Bean, Inc.* v. *Pledger*, No. 91-2479, slip op. at 1 (Ch. December 8, 1994), the Arkansas Department of Finance and Administration continued to "treat Bean as a vendor required to collect and remit compensating use tax and to report to the Department regarding taxable transactions" despite the Department's acknowledging that the company lacked a "substantial nexus" with Arkansas. Even after *Quill*, the Department demanded "that Bean report sales and use taxes on its sales in July of 1992 and to remit payment together with a report of such sales to the Department by August 20, 1992." Slip op. at 2. As the Chancery Court found in ruling in L.L. Bean's favor and declaring the acts of state tax administrators unconstitutional, "the demand that L.L. Bean report and pay taxes . . . indicates that the violations could recur." Slip op. at 3.

constitutional rights and remedies before those courts. Indeed, the language of the Tax Injunction Act — which brings the bar to federal court jurisdiction into play only if the state court provides a "plain, efficient and speedy remedy" — was intended to make clear that taxpayers were not limited in their rights, but only in the *procedures* available to pursue those rights.

To interpret the Tax Injunction Act as anything other than a jurisdiction-shifting arrangement would deprive citizens of the single most effective means for vindication of their constitutional rights. If such a limitation is to be imposed upon citizens' abilities to pursue constitutional claims, it should be the result of a clear expression of legislative intent by Congress. It should not be the product of a strained judicial effort to extend the Tax Injunction Act beyond the clear bounds of its language by reading into the Act a subtle and implicit restriction never mentioned in its legislative history.

For the reasons stated herein, DMA asks the Court to reverse the decision of the Oklahoma Supreme Court in *Private Truck Council of America, Inc.* v. *Oklahoma Tax Commission*, 879 P.2d 137 (Ok. 1994).

Respectfully submitted,

GEORGE S. ISAACSON*
MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
Lewiston, Maine 04243-3070
(207) 786-3566

ROBERT J. LEVERING
Senior Vice President
Direct Marketing Association
Washington, D.C. 20543

Attorneys for *Amicus Curiae*
Direct Marketing Association

**Counsel of Record*